83-1095

# in the Supreme Court of the United States

NO. USCA

JOHN TAYLOR,

*Petitioner*

*vs.*

UNITED STATES OF AMERICA,

*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Petition, JOHN TAYLOR, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered in the proceeding on September 8, 1983. Petition for Rehearing filed therein was denied November 4, 1983.

## QUESTIONS PRESENTED

1. Whether evidence adduced by the Government at trial which shows the presence of a criminal defendant charged with conspiracy at the scene of the substantive crime charged, the generalized association of that Defendant with his alleged co-conspirators, and the Defendant's knowledge that an illegal transaction was taking place, is sufficient to withstand Motion for Directed Judgment of Acquittal pursuant to Rule 29(a) Rules of Criminal Procedure at closing of the Government case where such evidence fails to evince the criminal Defendant's participation in the conspiracy charged.

2. Whether the Government may introduce hearsay declarations of a Co-Defendant against a Defendant to prove the Defendant's participation in the conspiracy charged where there is no substantial independent evidence of the Defendant's participation in the specific conspiracy charged. Whether testimony by a Government witness of statements made by a Co-Defendant charged with conspiracy regarding a Defendant are as to that Defendant irrelevant and otherwise inadmissible hearsay not subject to exception under Rule 801(d)(2)(e), Rules of Evidence, where such hearsay statements are testimony of a crime which does not relate to the substantive charges set forth in the Indictment, nor to the specific conspiracy actually charged in the Indictment. Whether the admission of such hearsay statements of a Co-Defendant against the Defendant prejudiced the Defendant's right to fair trial assured the Defendant under Amendment V, United States Constitution.

3. Whether a criminal Defendant charged with conspiracy is entitled to severence where he is charged in three counts of a nine count Indictment, where that Defendant is charged in the Indictment with seven Co-Defendants, where the testimony presented at trial substantially relates events solely involving the Co-Defendants and conversations had between Co-Defendants and a Government agent at which the Defendant was not present, was not mentioned, in which the Defendant did not participate. Whether denial of such Defendant's request for severance would prejudice the Defendant's right to fair trial assured the Defendant under Amendment V, United States Constitution.

4. Whether Government failure to prior to or at trial provide all Jencks Act Grand Jury testimony of the sole Government witness to testify at trial as requested by defense counsel prejudices the Defendant's rights to effective assistance of counsel and fair trial, contrary to Amendments V and VI, United States Constitution. Whether the Defendant is entitled to remand of the cause for evidentiary hearing to determine the extent of prejudice caused the Defendant by such Government failure to provide all Jencks Act Grand Jury testimony of its sole witness.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit and the Order on Petition for Rehearing are attached hereto as Appendices A and B respectfully. Such addressed each of the issues raised below and herein.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments V & VI.

## STATUTE INVOLVED

21 U.S.C.A. §846; 21 U.S.C.A. §841(a)(1)

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## STATEMENT OF CASE

On April 28, 1982, the Indictment was filed herein which Indictment by Count I charged the Appellant, JOHN TAYLOR, together with eight (8) Co-Defendants with conspiracy to violate Title 21, United States Code, Section 841(a)(1) in violation of Title 21, United States Code, Section 846. The aforementioned Indictment alleged that such conspiracy existed from an unknown time prior to December 16, 1981 and continued until April 28, 1982.

The Indictment further charged Mr. Taylor by Counts VIII and IX of the Indictment with distribution of heroin in violation of Title 21, United States Code, Section 841(a)(1) and Title 18 United States Code, Section 2 and with possession with intent to distribute heroin in violation of Section 841(a)(1) and Title 18, United States Code, Section 2, all of which the Indictment alleged to have occurred on December 28, 1981 (Vol. I, R 1-5).[1]

On May 26, 1982, Mr. Taylor filed his Motion to Sever (Vol. I, R. 36-37). On June 3, 1982, United States Magistrate Patricia Jean Kyle entered her Order on Various Motions wherein she denied Mr. Taylor's Motion to Sever (Vol. I, R. 80-88).

On June 28, 1982, jury trial commenced before the United States District Court for the Southern District of Florida. Counsel for Mr. Taylor was provided at time

[1]The designation (Vol. # , R ) refers to the Record Volume and page number in Appeal below.

of trial Government witness Agent Williams, April 20, 1982, Grand Jury Trestimony. Counsel for Mr. Taylor was not provided Agent Williams, June 16, 1982, Grand Jury testimony which counsel for the Government utilized upon re-direct examination of Agent Williams at trial (Vol. IV, 473-478).

On July 3, 1982, at close of the Government case, counsel for Mr. Taylor moved for Judgment of Acquittal which Motion was denied (Vol. IV, R. 506-511). Mr. Taylor was convicted of Counts I, VIII and IX of the Indictment. Motion for New Trial was thereafter filed and denied (Vol. I, R. 138-139); Vol. I, R. 149). The United States Court of Appeals for the Eleventh Circuit affirmed in an opinion of September 8, 1983 and thereafter denied Mr. Taylor's Petition for Re-hearing on November 4, 1983.

## A. FACTS RELATING TO THE OFFENSE

On December 16, 1981, Government Agent Williams and Co-Defendant James Shingles, met and discussed the purchase of heroin. Mr. Taylor was not present (Vol. II, R.168). On December 16, 1981, Agent Williams consummated the sale of heroin with Co-Defendants McKinney, Floyd, and Shingles. Mr. Taylor was not present. (Vol. II, R.174-183, 185-186, 192-193; Vol. III, R-215-217, 221-222). Mr. Taylor was not present when the Agent discussed with Shingles his "Cuban" connection on December 16, 1981, (Vol. III, R.226), nor present on December 16th when McKinney discussed with the Agent purchase of "kilo quantities of cocaine". (Vol. III, R.225)

Mr. Taylor was not known to be involved with the transactions of December 16, 1981. (Vol. IV, R.420). On December 28, 1981, Co-Defendant Shingles and the Agent discussed future transactions telephonically which conversations were recorded and introduced at trial. Mr. Taylor was not a party to, nor mentioned in these recorded conversations. (Vol. III, R-232-233, 236). The record reveals that Mr. Taylor was not present when the Agent met Co-Defendant Shingles at Miami Airport on December 28, 1981, where future transactions were discussed. (Vol. III, R.244).

Later on December 28, 1981, the Agent Williams met Mr. Taylor at a house in Miami where Mr. Taylor advised the Agent of his legitimate business, his night club and "studio". The Agent and Mr. Taylor "talked in general". (Vol. III, R-257-259; Vol. IV, R.426, 427-428). A sale of heroin was consummated between Co-Defendant McKinney and Agent Williams at this house in Miami in Mr. Taylor's presence on December 28, 1981. Mr. Taylor did not participate in the negotiations for sale of the contraband, did not participate in the sales transaction itself between McKinney and the Agent, and was physically excluded from contemporaneous negotiations at time of the sales transaction by the participants themselves on December 28, 1981, when Co-Defendants McKinney, Shingles and the Agent separated themselves from John Taylor by going into the next room to privately discuss the transaction, its logistics, the price, and future business. (Vol. III, R-268-271; Vol. IV, R-431-434) Agent Williams testified that to his knowledge, John Taylor had never met Co-Defendant Shingles prior to December 28, 1981. (Vol. IV, R.423-424), that John Taylor never handed him any heroin or cocaine (Vol. IV, R.424), that John Taylor did not discuss with

the Agent the price of heroin (Vol. IV, R.345), and that the Agent had no evidence that John Taylor was a source of heroin. (Vol. IV. R.435)

The record reveals that Mr. Taylor was not a party to any conversation, meeting, or arrangement for sale of cocaine or heroin thereafter had between his Co-Defendants and the Agent Williams.

The record reveals that the Agent Williams and Co-Defendant McKinney came uninvited to Mr. Taylor's home on March 26, 1982, they "just talked in general", (Vol.III, R.334-335), and Mr. Taylor advised the Agent Williams of his belief that the Agent was an undercover police officer (Vol.III, R.334-335). Agent Williams thereafter departed.

Over defense counsel's objection, (Vol.III, R.311-313), Agent Williams testified as to conversations had with Co-Defendant McKinney outside Mr. Taylor's presence as to Mr. Taylor's purported past delivery of an unspecified amount of contraband to New Orleans at an undetermined time which purported transaction was not shown or mentioned to involve any of Mr. Taylors' alleged co-conspirators. (Vol.III, R.332).

Agent Williams was asked at trial on cross-examination, as to his Grand Jury Testimony of April 20, 1982, and acknowledged same wherein he testified that he gave $20,000.00 to Co-Defendant McKinney for the contraband on December 28, 1981. Agent Williams on direct examination testified that upon receipt of the contraband from Co-Defendant McKinney (as to the same $20,000.00) that he without conversation, handed Co-Defendant Floyd $10,000.00 to count and Mr. Taylor

$10,000.00 because "Floyd was still counting the money and Taylor was closest to me and he just accepted it." (Vol.III, R.268-270). On re-direct examination, Agent Williams testified that he handed Mr. Taylor the same full $20,000.00 to count, as he had testified in his subsequent June 16, 1982 Grand Jury testimony which Grand Jury testimony was not provided counsel for Mr. Taylor.

## REASONS FOR GRANTING THE WRIT

This case presents conflict with the decision law of this Court and creates a real and embarrassing conflict of opinion and authority between Courts of Appeal that can only be resolved by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *NLRB v. Pittsburg S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 8 L.Ed.2d 39, 82 S.Ct. 913 (1962); *Commissioner v. Bilder*, 369 U.S. 499, 8 L.Ed.2d 65, 82 S.Ct. 881 (1962). The facts as set forth in the record (not the Argument Section of Respondent's Brief below, pages 11-16) reflect the presence of Petitioner at the scene of a single transaction in which he did not participate, the generalized association of Petitioner with his alleged co-conspirators, and the generalized knowledge of Petitioner on a total of four (4) isolated occasions that something illegal was, or may have been going on during a period from December 16, 1981 through April 28, 1982. The decision below conflicts with the following authorities because it renders Petitioner guilty of the charge of conspiracy by his mere presence at the scene of a substantive offense and generalized association with the actual perpetrators of that substantive offense: *Katteakos v. United States*, 328 U.750, 66 S.Ct. 1239, 90

L.Ed. 1557 (1946); *Ingram v. United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503 (1959); *United States v. Wieschenberg*, 604 F.2d 326, 335-336 (5th Cir. 1979); *United States v. DeSimone*, 660 F.2d 532, 536-538 (5th Cir. 1981); *United States v. Mehtala*, 578 F.2d 6 (1st Cir. 1978); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *United States v. Baker*, 499 F.2d 845 (7th Cir. 1974) *cert denied*, 419 U.S. 1071, 95 S.Ct. 659, 42 L.Ed.2d 667 (1974); *United States v. Weaver*, 594 F.2d 1272 (9th Cir. 1979); *United States v. Peterson*, 549 F.2d 654 (9th Cir. 1977); *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974); *United States v. Gardner*, 475 F.2d 1273 (9th Cir. 1973); *United States v. MacPherson*, 664 F.2d 69 (5th Cir. 1981); *United States v. Reyes*, 595 F.2d 275 (5th Cir. 1979).

The decision of the Eleventh Circuit Court of Appeal sub judice creates a real and embarassing conflict with the following authorities because it permits into evidence hearsay testimony of a Co-Defendant as to events concerning Petitioner that occurred at an undetermined time that were not shown to relate to. or be a part of, the conspiracy charged to prove the conspiracy charged: *Anderson v. United States*, 417 U.S. 211, 218 n.6, 41 L.Ed.2d 20, 29 n.6(1974); *United States v. Nixon*, 418 U.S. 683, 700-702 41 L.Ed.2d 1039, 1059-1060, 94 S.Ct. 390(1974); *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979); *United States v. Radeker*, 664 F.2d 242 (10th Cir. 1981); *United States v. Holder*, 560 F.2d 953 (8th Cir. 1977); *United States v. Diecidue*, 603 F.2d 535, 553-555 (5th Cir. 1979) citing to *Panci v. United States*, 256 F.2d 308, 311 (5th Cir. 1958).

The decision of the Eleventh Circuit Court of Appeal sub judice creates real and embarrassing conflict with decision law in other circuits for reason that it allows the Government withholding of Jencks Act Materials (the June, 1982 Grand Jury testimony of the sole Government witness to testify at trial, Agent Williams) without remand for evidentiary hearing to determine prejudice to Petitioner. The decision below which held such omission to not substantially prejudice Petitioner's rights to effective assistance of counsel and fair trial assured under Amendments V and VI, United States Constitution, creates real and embarassing conflict with *United States v. Hinton*, 631 F.2d 769, 771 (D.C.Cir. 1980), and *United States v. Knowles*, 594 F.2d 753 (9th Cir. 1979).

Because the record reveals that Petitioner was not named in six (6) counts of the nine (9) count Indictment in which he was one of eight (8) Defendants, because the evidence introduced at trial which related almost exclusively to his Co-Defendants was often of sensational quality, and because the spill-over effect of evidence introduced against other Defendants not relevant to Petitioner's case could not be alleviated other than by severance, the Trial Court erred in denial of Petitioner's Motion for Severance.

## ARGUMENT

Petitioner contends that the facts of record fail to reflect Petitioner's participation in the conspiracy charged, that the record at most reflects only the Petitioner's presence at the scene of the December 28, 1981 transaction in which he was not a participant, Petitioner's knowledge

that something illegal was going on, and Petitioner's generalized association with the actual participants in the December 28, 1981 transaction. Such is insufficient as a matter of law to support the conspiracy conviction obtained below: *Katteakos v. United States*, 328 U.750, 66 S.Ct. 1239, 90 L.Ed. 1557(1946); *Ingram v. United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503 (1959); *United States v. Wieschenberg*, 604 F.2d 326, 335-336 (5th Cir. 1979); *United States v. DeSimone*, 660 F.2d 532, 536-538 (5th Cir. 1981); *United States v. Mehtala*, 578 F.2d 6 (1st Cir. 1978); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *United States v. Baker*, 449 F.2d 845 (7th Cir. 1974) *cert.denied*, 419 U.S. 1071, 95 S.Ct. 659, 42 L.Ed.2d 667(1974); *United States v. Weaver*, 594 F.2d 1272 (9th Cir. 1979); *United States v. Peterson*, 549 F.2d 654 (9th Cir. 1977); *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974); *United States v. Gardner*, 475 F.2d 1273 (9th Cir. 1973); *United States v. MacPherson*, 664 F.2d 69 (5th Cir. 1981); *United States v. Reyes*, 595 F.2d 275 (5th Cir. 1979).

The decision below cites to *United States v. Blasco*, 702 F.2d 1315 (11th Cir. 1983) which held at page 1330: "It is incumbent upon the prosecution in conspirary cases to demonstrate each Defendant's individual participation in the alleged conspiracy. A Defendant may not be convicted unless the evidence adduced at trial is sufficient to demonstrate his *own* complicity beyond a reasonable doubt. Guilt by association may not attach; the prosecution must *individualize* its proof as to each alleged conspirator." (Court's emphasis)

Petitioner submits that as the evidence adduced at trial was insufficient as a matter of law to support the conspiracy conviction obtained, so too Petitioner's conviction on the substantive Counts VIII and IX properly should fall. This is for reason that absent the purported "conspiracy" there is no evidence as would permit the Government to bootstrap convictions for such offenses. The doctrine of *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) and its progeny cannot properly be applied to permit Petitioner's convictions of these substantive offenses to stand. *United States v. Pardo*, 636 F.2d 535 (D.C.Cir. 1980); *United States v. Staten*, 581 F.2d 878 (D.C.Cir. 1978); *United States v. Ferg*, 504 F.2d 914, 916-917 (5th Cir. 1974); *United States v. Horton*, 488 F.2d 374 (5th Cir. 1974); *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968).

Petitioner submits that the admission into evidence at trial of testimony as to admissions made by one of Petitioner's Co-Defendants of matters concerning Petitioner, not shown to relate to or be a part of the conspiracy charged for purposes of proving the conspiracy charged was in error and requires reversal. Such testimony was inadmissible hearsay and not properly subject to exception under Rule 801(d)(2)(e) Rules of Evidence. *United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979); United States v. Radeker*, 664 F.2d 242 (10th Cir. 1981); *United States v. Holder*, 560 F.2d 953 (8th Cir. 1977); *United States v. Diecidue*, 603 F.2d 535, 553-555 (5th Cir. 1979) citing to *Panci v. United States*, 256 F.2d 308, 311 (5th Cir. 1958); *Anderson v. United States*, 417 U.S. 211, 218 n.6, 41 L.Ed.2d 20, 29 n.6 (1974).

The Court below relies upon *United States v. Miller*, 664 F.2d 826 (11th Cir. 1981) in its pronouncement that "there was sufficient evidence of conspiracy to permit the admission of the co-conspirator's statements under Federal Rule of Evidence 801(d)(2)(e), even though no *James* Hearing was held", but fails to consider that the hearsay statements at issue were not shown to be in furtherance of the conspiracy charged or otherwise to relate to the conspiracy charged. The citation in the opinion below of the *Miller* decision *supra*, which case addresses the circumstance where no hearing was held pursuant to *United States v. James*, 590 F.2d 575, 580-581 (5th Cir.) (en banc) *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), does not address this issue raised.

The opinion below cites to *United States v. Russell*, 703 F.2d 1243, 1247-1248 (11th Cir. 1983), in support of its holding that "there was no abuse of discretion in the denial of motion to sever". The *Russell* decision *supra*, does acknowledge that severance should be granted where evidentiary spill-over creates a "compelling prejudice against which the Trial Court (is) unable to afford protection" (at 1247). The record sub judice, as reflected in the Statement of the Case and Facts herein, clearly evinces such evidentiary spill-over which did substantially prejudice Petitioner as to deny Petitioner fair trial. For such reason reversal and new trial are mandated.

The Court below cites to *United States vs Rivero*, 554 F.2d 213 (5th Cir. 1977) in support of its ruling that a lack of showing by Petitioner of government "bad faith" in the Government failure to provide all *James*

material as to the sole Government witness herein obviates the necessity of evidentiary hearing to determine prejudice to Petitioner from such failure to provide the June 16, 1981 Grand Jury testimony of said witness. We repectfully submit that such failure to fully disclose Grand Jury testimony of the sole Government witness requires reversal or at minimum evidentiary hearing to determine the extent to which Petitioner was prejudiced by such Government omission. *United States v. Knowles*, 595 F.2d 753 (9th Cir. 1979); *United States v. Hinton*, 631 F.2d 769, 771 (D.C. Cir. 1980).

## CONCLUSION

For these reasons the Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit,

Respectfully submitted,_

/s/

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit has been furnished by MAIL DELIVERY to: LURANA SNOW, Assistant U.S. Attorney, 299 East Broward Boulevard, Fort Lauderdale, Florida 33301, this 3d day of January, 1984.

/s/ _____
ROBERT C. STONE, ESQ.

## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5911
Non-Argument Calendar

D.C. Docket No. 82-06058

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

JOHN TAYLOR,

*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United District Court for the Southern District of Florida, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

September 8, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5911
Non-Argument Calendar

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

JOHN TAYLOR,

*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

(September 8, 1983)

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

John Taylor appeals his conviction of three narcotics violations: conspiracy to distribute cocaine and heroin (21 U.S.C.A. §846), and distribution of heroin and possession with intent to distribute heroin (21 U.S.C.A. §841(a)(1) ). We affirm.

The evidence set forth in the Government's brief, pages 11 to 16, was sufficient to withstand the motion for acquittal. *United States v. Blasco*, 702 F.2d 1315, 1330-32 (11th Cir. 1983).

There was sufficient evidence of conspiracy to permit the admission of the coconspirator's statements under Federal Rule of Evidence 801(d)(2)(E), even though no *James* hearing was held. *United States v. Miller*, 664 F.2d 826, 827-28 (11th Cir. 1981).

There was no abuse of discretion in the denial of the motion to sever. *United States v. Russell*, 703 F.2d 1243, 1247-48 (11th Cir. 1983).

As to the *Jencks* material, there is no showing of bad faith by the Government and no sufficient indication of prejudice to a fair trial or effective assistance of counsel to require an evidentiary hearing or a new trial. *United States v. Rivero*, 554 F.2d 213, 215 (5th Cir. 1977).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5911

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*versus*

JOHN TAYLOR,

*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING
(November 4, 1983)

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT: